

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1508 ~~76-8437~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA :

-against- :

LEROY HAYES, :

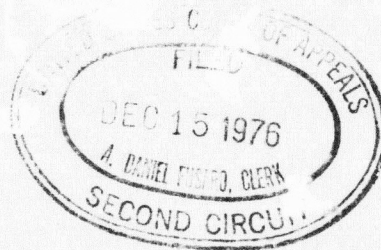
Appellant. :

Docket No. 76-8437

B
P/S

-----X
On Appeal from the United States District Court
For the Southern District of New York

A P P E N D I X



FREDERICK H. COHN

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ATTORNEY FOR Appellant

Appellant

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
UNITED STATES OF AMERICA
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LEROY HAYES,
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Appellant.
:
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APPENDIX

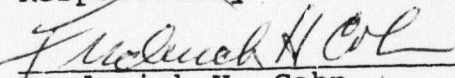
Respectfully submitted,

Frederick H. Cohn
Attorney for Appellant

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
 : INDICTMENT
-against- : 76 CRIM 0362
LEROY HAYES, :
Defendant. :
-----X

COUNT ONE

The Grand Jury charges:

On or about the 1st day of April, 1976, in the Southern District of New York, LEROY HAYES, the defendant, unlawfully, wilfully and knowingly, by force, violence and intimidation, did take and attempt to take, from the person and presence of another, money in the approximate amount of \$1,470 which belonged to, and was in the care, custody, control, management, and possession of, Chase Manhattan Bank, 110 West 52nd Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a).)

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of April, 1976, in the Southern District of New York, LEROY HAYES, the defendant,

unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of various persons by the use of a dangerous weapon, to wit, a firearm, while committing the offense described in Count One of this Indictment.

(Title 18, United States Code, Section 2113(d).)

COUNT THREE

The Grand Jury further charges:

On or about the 25th day of March, 1976, in the Southern District of New York, LEROY HAYES, the defendant, unlawfully, wilfully and knowingly, by force, violence and intimidation, did take and attempt to take, from the person and presence of another, money in the approximate amount of \$12,250, which belonged to, and was in the care, custody, control, management, and possession of Manufacturers Hanover Trust Co., 401 Madison Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a).)

COUNT FOUR

The Grand Jury further charges:

On or about the 25th day of March, 1976, in the Southern District of New York, LEROY HAYES, the defendant, unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of various persons by the use of a dangerous weapon, to wit, a firearm, while committing the offense described

in Count Three of this Indictment.

(Title 18, United States Code, Section 2113(d).)

COUNT FIVE

The Grand Jury further charges:

On or about the 2nd day of April, 1976, in the Southern District of New York, LEROY HAYES, the defendant, unlawfully, wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with agents of the Federal Bureau of Investigation who were then engaged in and on account of the performance of their official duties, in that he forcibly resisted arrest and assaulted the arresting officers.

(Title 18, United States Code, Section 111 and 1114.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

FILE NO ☐ JUDGE XXXXXXXX Assigned 0339X
 CASE NO ☐ 0208 01
 ANOR Mis ☐ 01
 LOHY Fel ☒ District Office

U.S. vs. HAYES, ROY (INDICTED AS LEROY HAYES)
 (LAST, FIRST, MIDDLE)

General Day
 Mo 04 09
 No. of Del's 01

76 0362 01

U.S. MAG. CASE NO. 76-425

U.S. TITLE/SECTION
 18:2113 (a) Bank robbery.
 18:2113(d) Assault jeopardizing lives in bank robbery.
 18:111 & 1114 Assault of Federal officer.

OFFENSES CHARGED

ORIGINAL COUNTS
 1, 3
 2, 4
 5

SUPERSEDING COUNTS

RAIL - RELEASE
☐ AMT ☐ Fugitive
☐ Denied ☐ Set ☐ Purs. Incap.
☐ PSA
☐ Date ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Conditional
☐ Status Changed (See Docket) ☐ 3rd ☐ Priy Cust ☐ Other

II. KEY DATES & INTERVALS

ARREST ON 11:30a.m. 4/2/76
 High Face Date 4-9-76
 Information 4-9-76
 Trial Date 4-12-76
 Trial Begun 4-12-76
 Trial Ended 4-12-76

INDICTMENT X
 ASSIGNMENT
 TRIAL

SENTENCE
 7-14-76
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On Govt. Pardon

MAGISTRATE

DATE 4/2/76 INITIAL NO. HJR-080D
 COMPLAINT
 GIFFENSE (In Complaint) 18 USC 2113(a) and 111

INITIAL APPEARANCE DATE 4/2/76
 PRELIMINARY EXAMINATION OR REMOVAL HEARING
☐ WAIVED ☐ NOT WAIVED
☐ WHITE PENDING INDICTMENT

OUTCOME
☐ DISMISSED
☐ HELD FOR GOV. OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GOV. OR OTHER PROCEEDING IN DISTRICT - FLOW

ATTORNEYS Defense ☐ CJA ☐ Ind. ☐ Waived ☐ Sent. ☐ None / Other ☐ Ind. JCP

BEST COPY AVAILABLE

Show last names and suffix numbers of other defendants or same indictment information

DATE (DOCUMENT NO.) PROCEEDINGS

4/2/76 Complaint filed, to retain own counsel. Defendant remanded into the custody of U.S. Marshal in lieu of \$25,000 cash or surety.

4/9/76 Indictment filed, 76 Cr. 362

4-15-76 Deft. (Atty. Jack Lipson) Court directs entry of not guilty plea. Bail fixed by Mag. Cont'd. (\$25,000 Bail) Deft. cont'd. remanded in lieu of bail. Case assigned to Judge Griesa, J. Lasker, J.

4-23-76 Defts application for reduction of bail denied....Griesa, J.

4-29-76 Defts 2nd application for reduction of bail denied..Griesa, J.

5-3-76 Filed affdvt. of Frederick H. Cohn dtd. 4-29-76..

6-7-76 Filed Dft. Notice of Motion to Suppress Prior Convictions of Dft. XXX Ret. Sine Die.

6-7-76 Filed Dfts. Notice of Motion to Suppress Statments. Ret. Sine Die.

6-7-76 Filed Dfts. Notice of Motion to Suppress Physical Evidence. Ret. Sine Die.

6-7-76 Filed Dfts. Notice of Motion to Suppress Pretrial Identification. Ret. Sine Die.

EXCLUDABLE DELAY (a) (b) (c) (d)

ATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY
(DOCUMENT NO.)			
6-7-76	Filed Dfts. Memorandum of Law in support of motions to suppress.		
6-7-76	Filed Dfts. Memorandum of Law in support of Motion to Suppress prior convictions.		
6-9-76	Filed Gov'ts. Affidvt. by Barry W. Mawn, Special Agent of Fed. Bureau of Investigation of Armed Robbery of Mfg. Hanover Trust Co.,		
6-11-76	Filed Memo. End. letter from Petitioner dft. ... Motion is denied.... Pierce J. (Pro Se mailed notice)		
6-11-76	Filed Dfts. Requests to charge.		
6-14-76	Jury Trial begun before Cooper J.		
6-15-76	Trial Cont'd.		
6-16-76	Trial Cont'd.		
6-17-76	Trial Cont'd & Concluded. Dft. Guilty on all (5) counts. Motion reserved until day of sentence. (Jury Polled). Pre Sentence report ordered. Probation Notified. Sentence July 14, 1976 at 12: Noon Dft. Remanded..... Cooper J.		
7-6-76	Filed Gov'ts. Sentencing Memorandum.		
7-14-76	Dft. (eroy Hayes Atty. Present) Sentenced - Counts 1 & 3 merged for for sentence into counts 2 & 4 - Dft. sentenced on Count 2 to Fifteen (15) years. Count 4 fifteen (15) Years. to run consecutively with each other. Ct. 5 Three (3) Years to run consecutively with sentence imposed on Counts 2 & 4. These sentences shall be independant of any sentences now being served by this dft. or any future sentence that may be imposed. Dft. advised of his right to appeal. Dft. Remanded. Cooper J.		
7-20-76	Filed Dfts. Notice of Appeal from judgment dtd. 7-14-76. (M/N)		
7-21-76	Issued Remand.		
7-14-76	Filed Judgment & Commitment (Atty Frederick Cohn Present) The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of THIRTY THREE (33) YEARS. Counts 1 & 3 merged for purposes of sentencing into counts 2 & 4. Dft. is sentenced on Count 2 to a term of imprisonment of FIFTEEN (15) YEARS. DFT. IS Sentenced on count 4 to a term of imprisonment of FIFTEEN (15) YEARS to run consecutively with the sentence pronounced on Count 2. Dft. is sentenced on Count 5 to the sentences pronounced on counts 2 & 4. The sentence shall be independent of any sentence now being served by this dft. of any future sentence that may be imposed..... Cooper J. Issued Commitment 7-23-76.		

RECEIPT NUMBER

CO. NUMBER

DATE

RECEIPT NUMBER

CO. NUMBER

Filed Temporary commitment Dated: 4-2-76. RABY, U.S. MAG

DATE	PROCEEDINGS
	Page #3
8-10-76	Filed Notice of Certification of record to the USCA.
8-17-76	Filed True Copy of J&C with marshals ret, Dft. delivered to Warden, MCC, NY on 7/23/76.
8-20-76	Filed Opinion #44991. For the foregoing reasons, principally relating to the lack of specificity as to dfts. financial status, we are constrained to, & do, deny dfts. motion at this time, with permission to renew if, as & when the infirmities are cured...Cooper J. (mn)
9-10-76	Filed Copy of J&C with Marshals ret Dft. delivered to Warden, MCC on 7-23-76. & Dft. delivered on 8/12/76 to U.S. Penitentiary, Marion, Ill.XE
9-20-76	Filed Dft. Notice of Motion & supporting affdvt. for XXXX order to Appeal in forma pauperis. Ret. 9/13/76
10-20-76	Filed Memo. End. on dfts. motion dtd. 9-20-76. Application is Granted.Cooper J. (mn)

DEFENDANT'S RECENT NARCOTICS CONVICTION
SHOULD NOT BE BARRED AS EVIDENCE TO
IMPEACH HIS CREDIBILITY

Defendant bids this Court to bar the Government from impeaching his testimony, should he testify, with proof of his recent narcotics conviction in the Southern District of Florida and his 15 year old robbery conviction in New York. Defendant's recent narcotics conviction, which is the only conviction the Government intends to utilize as impeachment evidence,* is probative on the issue of defendant's credibility as a witness and will not unfairly prejudice defendant should he testify in his own defense.

Rule 609 of the Federal Rules of Evidence does require the Court to make a determination of whether the probative value of defendant's narcotics conviction as impeachment evidence is outweighed by its prejudicial

effect to the defendant. Here, the factors to be considered in making that determination, suggested in United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969) favor admission rather than exclusion.

* The Government's present lack of intent to use defendant's older robbery conviction should not be relied upon by him as an invitation to, attempt affirmatively to portray himself to the jury in some fashion as one who has no such conviction.

exclusion. The conviction is of recent vintage, unlike the convictions in Palumbo and United States v. Puco, 453 F.2d 539 (2d Cir. 1971), and thus bears far more directly upon the present credibility of the defendant. By the same token, the conviction here is for narcotics, not for bank robbery, and thus avoids the kind of unfair prejudice which worried the court in Puco, where Puco's previous conviction was for the exact crime as that for which he was then on trial. That being the case, there is no reason to believe that at the trial here the jury will be unable to rationally weigh the evidence of defendant's guilt and follow the Court's instructions to weigh and consider defendant's narcotics conviction only in assessing his credibility as a witness.*

* If there is any difficulty in making a determination here because defendant seeks the ruling in advance of trial, this Court may properly postpone making the requested determination until after defendant has testified. See United States v. Cacchillo, 416 F.2d 231 (2d Cir. 1969); United States v. Crisona, 416 F.2d 107 (2d Cir. 1969), cert. denied, 397 U.S. 961 (1970).

IDENTIFICATION DIVISION

The following FBI record, NUMBER 591 151 D

is furnished FOR OFFICIAL USE ONLY

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
PD NY NY	Leroy Hayes #B-458958	6-4-60	GL - 1294 PL (merchandise)	
Prob Dept Court of Gen Sess NY NY	Leroy Hayes #81094	6-4-60	PG PL	
PD NY NY	Leroy Alven Hayes #--	9-8-61	aslt & robb 240PL & 2124 PL	
Prob Dept Court of Gen Sess NY NY	Leroy Hayes #85755	9-8-61	rob 3rd deg	
Elmira Rec Center Elmira NY	Leroy Hayes #23667	11-30-61	robbery 3rd	2-6-0/5-0 JT 39 das
DEA Miami FL	Roy Alven Hayes G1-75-0278	11-16-75	Cocaine- Smuggling	
USM NY NY	Roy Albert Hayes	4-2-76	1) bank robbery 2) aslt on Fed Officers	

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on information formerly furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

11 Defendant Hayes also moves for an order precluding
12 the Government from using his prior convictions to impeach
13 his credibility, and an order suppressing certain physical
14 evidence seized from defendant at the time of his arrest.

15 We have decided, for the reasons I'm about to
16 announce, to deny those motions in their entirety.

17 Defendant Hayes has two prior convictions of
18 which this Court is aware, the first for bank robbery
19 third degree in 1961 in New York, and the other for
20 possession of cocaine in 1976 in the Southern District
21 of Florida.

22 Defendant argues that the Court in its discretion
23 should forbid the Government from cross-examining the
24 defendant about the prior conviction for cocaine possession
25 since the probative value is outweighed by its prejudicial

1 bslm

2 effect.

3 Defendant maintains that this is essentially
4 true where narcotics convictions are involved. See United
5 States against Palumbo, P-a-l-u-m-b-o, 401 Fed. 2d, 270,
6 Second Circuit 1968; United States against Puco, P-u-c-o,
7 453 Fed. 2nd, 539, Second Circuit, 1971.

8 Federal Rules of Evidence, 609(a). Defendant
9 claims that his narcotics conviction occurring as it has
10 only a few months ago, will "cast a pall of general
11 bad character upon this defendant." That comes from Mr.
12 Cohn's memorandum at page 2.

13 While defendant is correct that Federal Rules
14 of Evidence 609 requires the Court to determine whether
15 the probative value of defendant's narcotics conviction
16 as impeaching evidence outweighs its potential for prejudice,
17 defendant's reliance on United States against Palumbo and
18 the Puco case to aid us in that determination is inappro-
19 priate. In Palumbo and Puco the prior convictions in
20 question were remote in time. In Palumbo, defendant had
21 been convicted in 1929, 1937, 1945, 1946 and 1956. See
22 Palumbo at page 272.

23 In Puco, the defendant's prior narcotics convic-
24 tion was 21 years old and the court believed its "probative
force ... is greatly diminished by age." That is at page

1 bslm

2 543.

3 In the present case, the cocaine conviction,
4 which defendant seeks to preclude the Government from
5 introducing, occurred this very year, 1976, thus avoiding
6 the principal concern of remoteness expressed in Palumbo
7 and Puco.

8 Furthermore, we believe that the fact that
9 defendant has been convicted of a crime so recently, bears
10 directly on his present credibility. Moreover, since the
11 conviction here sought to be used by the Government is a
12 crime different in nature than that charged in the indict-
13 ment, the concern of the Puco court of the inevitable
14 prejudice which would arise from prior conviction for the
15 same crime is not present here.

16 For instance, in Puco, the court citing Gordon,
17 G-o-r-d-o-n against United States, 333 Fed. 2nd, 936, at
18 page 940, District of Columbia Circuit, 1963, said,
19 "Strong reasons arise for excluding those convictions
20 which are for the same crime because of the inevitable
21 pressure on lay jurors to believe that if he did it before
22 he probably did so this time. As a general rule, those
23 convictions should be admitted sparingly."

24 That is at page 542.

25 Since we believe that an instruction as to the

1 bslm

2 limited use of such a prior conviction will obviate any
3 unfair prejudice which may accrue to the defendant, we
4 deny defendant's motion to preclude the Government from
5 impeaching the defendant with evidence of his prior
6 cocaine conviction.

13a

19 Your Honor, before I proceed, I would ask that
20 I approach the bench with respect to one legal issue.

21 THE COURT: Surely.

22 (At the side bar.)

23 MR. NESLAND: I apologize, your Honor. I failed
24 to ask your Honor's ruling with respect to the Swiss Bank,
25 because I would like to --

14a

1 bslm

2 THE COURT: No. I am glad you are reminding me.
3 You say nothing about the Swiss Bank until the evidence
4 is in up to that point. Then I will hear argument on it
5 and then make any ruling.

6 MR. NESLAND: That will be the first witness;
7 it will be the employees of that bank.

8 THE COURT: No. You'll have to reverse your
9 proof. It would be the better part of wisdom, and it
10 would show everybody that the judge is trying to exhaust
11 all the evidence before he takes anything in connection
12 with the Swiss Bank.

13 I want to be in a position where I can say there
14 was enough evidence on identification, and I refuse to
15 allow the Swiss Bank material in; or there was insufficient
16 evidence on the question of identification and therefore the
17 application by the Government with regard to the Swiss
18 Bank is permitted.

15a

19 MR. NESLAND: Your Honor, I have only one witness,
20 Margaret Alston, from Chase Manhattan Bank, with respect
21 to that bank robbery, and then the matter of the Swiss
22 Bank robbery will be in issue.

23 THE COURT: I'd like to take that up now.

24 MR. NESLAND: If you would.

25 I have asked the witnesses to return, and of

16a

1 course, if necessary, I can tell them not to, over the
2 telephone, because I have their home telephone numbers
3 -- depending upon your Honor's ruling.
4

5 THE COURT: I was reflecting on the evidence as
6 it has been adduced today, and the issue of identity,
7 which is the sole criterion, as I read the law, which
8 should govern the admissibility or inadmissibility of
9 evidence relating to the Swiss Bank episode, has come
10 into sharp focus.

11 Mr. Cohn succeeded on cross-examination in bringing
12 from different witnesses a lapse of memory. Some of
13 them described the glasses worn by the defendant, had a
14 different version from others. You recall that Mr. McAteer
15 said that the band-aid was between the eyeglasses and the
16 hairline, at the temple, whereas another witness said
17 that the band-aid was on the nose.

18 Mr. Cohn also hammered away and got witnesses
19 to vary in their testimony on certain important particulars,
20 I think, and that's his duty, and that was his function.

21 The identity then leaves room for debate. There
22 is a variance, or there are variances. While we don't
23 expect the average citizen, not trained necessarily in
24 perception, to be able to give an exact image of a person
25 involved, especially under these trying circumstances--fear,

1 bslm
2 apprehension, a gun -- nevertheless, the record, I think,
3 is not exactly saturated, but there are plenty of short-
4 comings when it comes to a totality of what you might
5 call a "certitude" with respect to identification.

6 Since I feel that way, after looking at the
7 evidence, as I see it--and I am ready to hold my final
8 determination until I hear from counsel -- as I see it,
9 that is what I must look to in order to determine whether
10 we take testimony from the Swiss Bank and the behavior
11 of this defendant in that bank.

12 Let me tell you what I gather from your memoranda,
13 pro and con is the issue with regard to the Swiss Bank.
14 The Government says very, very plainly in its memorandum,
15 "We would have" -- that's the essence of what the Govern-
16 ment is saying -- "We would have accused the defendant
17 with additional charges relating to his behavior in the
18 Swiss Bank. We have done so already with regard to the
19 Chase Bank and with regard to the Manufacturers Trust
20 Company. The only reason we didn't, or the Grand Jury
21 didn't indict with regard to -- or the only reason we didn't
22 present any evidence to the Grand Jury on the Swiss Bank
23 situation was that the Swiss Bank was not covered by the :
24 Federal Deposit Insurance Corporation, which is a federal
25 act; the deposits were not so covered with regard to the
Swiss deposits."

1 The Government says, further, that it should be
2 allowed, nevertheless, to inquire as to what this defendant
3 did at the Swiss Bank. The Government contends that
4 evidence of the Swiss Bank robbery in March of 1976,
5 bearing a close date to the two dates with which we are
6 concerned already, is admissible to establish the identity
7 of the defendant as the perpetrator of the crimes charged,
8 since the proof will show a similar modus operandi for the
9 robbery of the Swiss Bank.
10

11 The Government alleges it did not indict this
12 defendant, I repeat, for the Swiss Bank robbery "solely
13 because the Swiss Bank is not insured by the Federal
14 Deposit Insurance Corporation."

15 That is to be found in the Government's memorandum,
16 page 1. And therefore, it is not indictable, or the
17 defendant is not indictable -- I'm sorry, therefore, not
18 indictable as a federal crime.

19 The Government asserts that the identity of the
20 robber is directly at issue since defense counsel has
21 given notice to the Government that Defendant Hayes will
22 seek to establish an alibi defense for the two robberies
23 charged.

24 The Government says it expects to prove at trial
25 that on March 25, '76, the defendant successfully carried

bslm

1 out an armed robbery of the Manufacturers Hanover Trust Co.
2 and that on April 1, same year, the defendant successfully
3 perpetrated an armed robbery of the Chase Bank at 110
4 West 52nd Street. Both robberies involved Midtown commercial
5 banks; both occurred in the morning, within a week of each
6 other; in each robbery the defendant was dressed in a
7 suit and tie and wearing glasses -- some said tinted,
8 but not the regular glass for reading as distinguished
9 from a colored glass; and that the defendant wore a knit
10 cap. Some said that the defendant carried a black brief
11 case in each bank to stash the money and that at the
12 Manufacturers Hanover Trust the defendant displayed a
13 distinctive silver-colored hand gun.
14

15 The Swiss Bank, located at 608 5th Avenue in
16 midtown Manhattan, is also a commercial bank, which was
17 robbed on March 24, 1976 at 10:30 a.m., the day both
18 Manufacturers Hanover Trust was robbed and a week before
19 the Chase Bank was robbed.

20 The Government says that it will prove that the
21 defendant, the robber, the same robber, the robber at the
22 Swiss Bank was dressed in a suit and tie, wore a knitted
23 cap, tinted glasses, carried a black brief case. He also
24 wore an overcoat identical to that worn by the robber at
25 the Manufacturers Hanover Trust. In addition, the robber

1 of the Swiss Bank used a silver-colored gun, demanded
2 "large" bills, and on exiting, hurdled the lane ropes,
3 as the testimony reveals this defendant did at the
4 Manufacturers Hanover Bank.
5

6 Further, the Swiss Bank robber, says the Govern-
7 ment, also wore a tape across his nose and that the tape
8 across the nose was the way the officers beheld this
9 defendant on the day that he was arrested.

10 Furthermore, and most significantly, it is
11 charged that the photographs taken from the surveillance
12 cameras at the Swiss Bank depict the same robber photo-
13 graphed at the Chase Manhattan Bank and the Manufacturers
14 Hanover Trust.

15 That is what I get from the Government's con-
16 tention in support of its argument that the evidence
17 relating to the Swiss Bank should be admitted.

18 I put it to the Assistant United States Attorney,
19 have I in my own halting fashion, in my own limitations,
20 have I pretty much summed up what it is that the Government
21 contends?

22 MR. NESLAND: Yes, your Honor. I would add
23 a few things which I don't think were clear from what was
24 previously presented to your Honor and which your Honor
25 is relying on.

1 bslm

2 The knit cap, which was worn at the Swiss Bank,
3 is very similar to the knit cap which was seized from
4 the defendant at the time of his arrest, and it seems --

5 THE COURT: And already in evidence.

6 MR. NESLAND: Already in evidence at the hearing
7 and will be in evidence at the trial.

8 THE COURT: You are right.

9 MR. NESLAND: I think the important focus in
10 the Swiss Bank identification is not only that these --
11 the Swiss robber is obviously the same as the three
12 robbers, but the modus operandi in particular at the
13 Swiss Bank is almost identical to the defendant's conduct
14 on the day he was arrested, and therefore --

15 THE COURT: To wit? Repeat it again.

16 MR. NESLAND: He had the tape across his nose
17 at the Swiss Bank. He had the tape on his nose when he
18 was first seen by the agents casing the Irving Trust
19 Co. He had the black brief case and the silver gun.

20 All the witnesses have testified about the
21 silver gun, but --

22 THE COURT: Silver-colored gun. Remember, you
23 are saying that the gun is made of silver.

24 MR. NESLAND: I get it mixed up with the Lone
25 Ranger, I guess. The only photograph, your Honor, is in

1 the Swiss photograph where you can see a silver-colored
2 gun in the photograph. You also have the overcoat at
3 Manufacturers Hanover Trust which, from the opening, was
4 the defendant's main alibi for the Manufacturers Hanover
5 Trust Co. robbery, and in the Swiss Bank he's wearing an
6 identical overcoat.
7

8 In addition, your Honor has seen all the photo-
9 graphs from every one of the banks as of now, and your
10 Honor can certainly attest to the fact that the Swiss Bank
11 photographs are far superior to the photographs taken at
12 the other banks, first of all, I think because of the
13 distance and perspective at which they were taken; and
14 second of all, because of what appears to be the difference
15 in the age or quality of the film which was used to
16 photograph at those two banks.

17 THE COURT: I have not seen any photographs
18 other than those that were offered in evidence.

19 MR. NESLAND: Those were offered in evidence
20 at the hearing. They were offered as Hearing Exhibit 1
21 through Agent Mawn who looked at them and said, "Yes, that
22 was the defendant."

23 THE COURT: Of course. That was at the hearing
24 and not at the trial.

25 MR. NESLAND: When you put together what is

1 bslm

2 apparently and obviously four robberies, one only becoming
3 an attempt because of the intervention of the FBI agents,
4 you have four robberies split a week; but two, back to back.
5 That is a very unique characteristic in anybody's picture;
6 that on March 24th and 25th two bank robberies are committed
7 by the same man. One week later, back to back, the defendant
8 again attempts to rob the -- successfully robs Chase
9 Manhattan Bank and, if it were not for the intervention
10 of the FBI, would have hit the Irving Trust Co. I think
11 that is a particularly unique characteristic, along with
12 the silver-colored gun, et cetera, that I have already
13 alluded to. So that beyond saying "similar modus operandi,"
14 you have here, I think, unique characteristics in these
15 robberies which certainly identify this defendant, who
16 was planning to rob the Irving Trust Co., as the same person
17 who robbed each of the three banks.

18 THE COURT: Mr. Cohn, before you respond, I
19 would like to have the record reveal that when I read your
20 memorandum on this point, along with the Government's, and
21 when I came to the conclusion that a faulty identification
22 might warrant the taking of the Swiss Bank episode, it
23 then occurred to me that if the photographs at the Chase or
24 Manufacturers Hanover were very clear of this defendant,
25 that I would not take the Swiss episode for the simple

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1 reason that the photographs from either the Chase or the
2 Manufacturers Hanover would be sufficient identification,
3 and I am not here to add on to identification. So I had
4 my law clerk call the Assistant United States Attorney to
5 inquire whether the photographs at either the Chase or
6 Hanover were clear, so I could make up my own mind how to
7 deal with this challenge, and I was told, as the evidence
8 seems to support, that Mr. Nesland regarded the photographs
9 at Chase or Hanover as not of the clarity that depicts the
10 photograph -- that reflects the photograph from the Swiss
11 Bank.
12

13 Am I right?

14 MR. NESLAND: That is correct, your Honor.

15 THE COURT: Now, please proceed.

16 MR. COHN: Your Honor, I will--although I will
17 not concede that some of the photographs of the first two
18 robberies, the two charged robberies, are not clear; some
19 are and some are not -- I will concede that the Swiss Bank
20 photos are clearer, and that is not the crux of my argument
21 here. The crux of my argument, your Honor, is that there
22 is no -- we are trying an untried charge by admitting the
23 Swiss Bank, because the same identity questions will enter
24 into that aspect as it will here, and what we will have
25 is a collateral trial on a third uncharged bank robbery

1 because the same questions and the same identification
2 questions will come in and indeed the same collateral
3 questions on the photographic spread. There is somebody
4 from the Swiss Bank robbery who, in fact, pulled the
5 wrong person out of the line-up, out of the photo spread,
6 took a totally different person, and it was given to me
7 as Brady material by the Government, and if the Swiss
8 Bank robbery comes in, I'm going to have to use it, and
9 what we are going to have is raising the same collateral
10 questions again and again and again in a way which must
11 be cumulative.
12

13 I understand that it's always better to show
14 three bank robberies than two bank robberies as far as the
15 Government is concerned, and I understand why.

16 Your Honor has been a trial lawyer and a jurist
17 for a long time and I'm sure your Honor must understand
18 why, too. That is why you hadn't made up your mind initially
19 because you understand that it can be so cumulative that
20 the jury says, "This guy must be doing it."

21 Here we have the same situation that was in a
22 sense -- that was raised in Drew against the United
23 States, 331 Fed. 2nd, 85. It is a D.C. Circuit case, and
24 I know that the D.C. Circuit cases are honored by failure
25 to follow them in this Circuit more often than by the

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2 following of them; but none the less, that is the closest
3 case that I could find where it was laid out on the record
4 as to the fact that the person who was charged in the
5 collateral crime uncharged, the person who was viewed in
6 that collateral crime was, in fact, not identified either.

7 If there was a concession as to the identity of
8 the person in that third bank robbery, being my client,
9 that would be another story, but I think here just the
10 similarity in modus operandi indeed is not enough.

11 Let's look at some of the dissimilarities
12 that we will find from that occurrence to the other
13 two occurrences and, in fact, to the occurrences on the
14 street as the proof will come in. In fact, I do not
15 believe that there has been any testimony as to the first
16 two bank robberies that there was a band-aid or tape over
17 the nose of the robber, and I don't believe that the
18 pictures show that. The pictures may be fuzzy on that,
19 but that is my recollection of the evidence so far. There
20 was some testimony as to a band-aid over the eye, but
21 there was no testimony as to a bandage over the nose.
22 There is no testimony that a robbery note was used.

23 Now, there will not be any testimony as to that
24 in the Swiss Bank robbery, but when the FBI agents arrested
25 this man, they claim he was chewing on a piece of paper

which they thought would be a robbery note saying, you know, "Give me the money," instead of him saying it aloud; so all these discrepancies seem to pile up.

We try a case in toto almost as -- in fact, as if it were a charged crime. I don't believe that the interest of justice is served under those circumstances and I ask your Honor to exercise your discretion in not permitting it.

THE COURT: Does the Government wish to say anything by way of response?

MR. NESLAND: By listening to the dissimilarities and the very few he can find, it seemed to confirm in my mind, and I would hope in your mind, that in fact the similarities are so obvious, so clear, and so many, that this is simply part and parcel of the defendant's scheme to enrich himself with the benefit of the help of a gun and at all of these banks.

THE COURT: Did you say "the dissimilarities"?

MR. NESLAND: The dissimilarities --

THE COURT: You rushed the words.

MR. NESLAND: He brought out so few dissimilarities between the three robberies that it confirmed in my mind, and I suggest it should confirm in your mind, that the similarities between them are so obvious and so many that

2 he had a very difficult time showing that any one of them
3 could be different or could have been done differently by
4 anybody else, and in fact, they were all done by this
5 defendant, and they are admissible.

6 I suggest that in terms of identification, they
7 are extremely important because you have at the time of
8 the arrest the piece of tape on the nose which goes back
9 to the Swiss Bank robbery which was not used in the others.

10 And other than that the similarities between
11 all the robbers -- between all the pictures of the robber
12 are the same. You have the same brief case, the same type
13 of M.O. Obviously he uses a different knit cap, but he
14 does use the same knit cap at the Swiss Bank as at the
15 attempt on the Irving Trust Co. when he was arrested, and
16 when you focus on identification of this defendant as those
17 robbers, you have the agents who arrest him. They are
18 going to concede that this defendant was arrested by these
19 agents. He's going to have to concede that. So that you
20 begin with a concession of identification with respect to
21 the defendant arrested and then when you go back and trace
22 all of the similarities and unique characteristics that
23 were seen on the day he attempted to rob Irving Trust, you
24 find without any question of a doubt that it was him who
25 robbed the other three banks, and that's what I mean when

I point out the identification issue which is raised in this case uniquely with the alibi defense.

He's opened with that, and obviously he's going to present that defense. He's named his witnesses to the jury in his opening, and he told them that the bottom line of that defense is whether or not that alibi defense is going to create a doubt in their minds that it could have been this defendant. I submit when that is the issue, that this evidence is properly admissible and should be admitted by your Honor.

THE COURT: Mr. Cohn, is there anything further you want to say?

MR. COHN: Your Honor, similarities or dissimilarities are really irrelevant at the moment. Only -- it's a question of whether this man did all three of them. We have an unknown. I have been through that in the third uncharged bank robbery, and I don't think that it's worth rehashing. Thank you for the opportunity.

THE COURT: It is overwhelmingly clear that in disposing of an offer of proof such as we have here, without regarding it as fraught with peril--that is, to rush in as fools do where angels fear to tread--it would be a mockery of justice if a judge were allowed to admit into evidence vital testimony which is tantamount to proving an additional

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2 crime not alleged in the indictment. So please abandon
3 the notion that this judge or any judge worthy of the
4 title would engage in a determination of this kind of
5 matter without enormous perturbation. I can testify that
6 has already besieged me; it's been a source of worry and
7 deep concern, and yet I have to make the decision. I can't
8 avoid it, it's here. I've got to face up to it.

9 I am not asked to receive this evidence concerning
10 the Swiss Bank for the purpose of proving criminal behavior
11 or criminal character. I wouldn't allow it in if that
12 were the purpose, to prove criminal character. But the
13 rule in this Circuit is that evidence of the commission
14 of criminal offenses by a defendant not charged against
15 him -- I repeat, not charged against him, is admissible
16 except when offered solely to prove criminal character.

17 United States against Keilly, K-e-i-l-l-y,
18 445 Fed. 2nd, 1285, at 1288, Second Circuit, certiorari
19 denied 406 US 962 in 1971.

20 It seems to us that the evidence here is clearly
21 admissible to prove the identity of the defendant as the
22 robber of the Manufacturers Hanover Trust Co. and the
23 Chase Manhattan Bank. The Swiss Bank robber had tape
24 across his nose, as the defendant, when arrested. The
25 Swiss Bank robber as well as the one at the Manufacturers

Trust Co. displayed a silver-colored hand gun similar to that seized from the defendant upon his arrest. The photographs taken by surveillance cameras at the Swiss Bank provided a clear picture of the defendant as the robber.

The facts surrounding two or more crimes show that the same person committed them. Due to the concurrence of unusual and distinctive facts relating to the manner in which each crime was committed, the evidence of one is admissible to the trial of the other to prove identity; I repeat: to prove identity.

United States against Johnson, 182 Fed. 2nd, 280, Second Circuit, 1967.

United States against Mahar, M-a-h-a-r, 519 Fed. 2nd, 1272, Third Circuit, 1975.

United States against Campanelli, 516 Fed. 2nd, 288 Second Circuit, 1975. Campanelli is directly on point with the situation presented here. In that case the evidence strongly suggested that persons who had committed thefts at two banks had earlier committed a theft of an American Legion Hall because all three places were broken into by persons unfamiliar with the premises who accomplished entry by prying the door open with an instrument that left similar paint marks.

Our Circuit held that evidence of the Legion Hall theft was properly admitted "since it tended to show that whoever committed the American Legion theft also broke into two banks. Evidence tending to show that the defendants committed the theft at the American Legion was probative of who had committed the two bank thefts charged." That is at pages 292, 293 of that opinion.

Accordingly, since this evidence offered of the Swiss Bank robbery is highly probative of the issue of identity, and since it is not being introduced solely to prove the defendant's criminal disposition, which I shall emphasize to the jury -- in fact elaborate on it and make it crystal clear that they would be violating their oath if they were to conclude that because a robbery was committed at one place, that therefore it follows that it must have been the same one who committed another robbery. That is probative.

The law not only denounces it, it says it would be an injustice if that kind of thinking is allowed to be engaged in. So we shall make it as crystal clear as humanly possible for us in our own strength and our own limitations. We see that we are compelled to and we are constrained to and we do grant the Government's application to admit such proof concerning the Swiss Bank episode.

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That's the ruling of the Court and you will

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proceed accordingly.

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(Witness excused.)

MR. COHN: May we come up, your Honor, before the next witness?

THE COURT: Certainly.

(At the side bar.)

MR. COHN: Your Honor, I think that now we come to the Swiss Bank robbery witnesses, and I am specifically requesting the Court not to give a limiting charge, the usual limiting charge as to this, because I think under the facts of this case the usual limiting charge, and the approved limiting charge will tend to confuse the jury, and I specifically waive it.

THE COURT: Let's go into the robing room and discuss this.

(In the robing room.)

MR. COHN: Your Honor, as I indicated at the side bar, I realize that I am entitled to a limiting charge and I think now would be the appropriate time to give it, as that evidence was coming in if I were going to get it. However, I think under the circumstances, our defense will be as follows:

I think on summation--and it is no secret to the

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2 prosecutor -- that the same person did all three.

3 There is no point -- if our alibi defenses as to
4 the first count, the first robbery on March 25th -- that
5 would really be the second robbery, but the first charged
6 robbery -- holds water, then, if it's the same person
7 as to all three, he walks as to all three. That's our
8 defense.

9 Under those circumstances, and given that, I
10 think no matter how you do it, the limiting charge here
11 tends to emphasize the damaging nature of the uncharged
12 crime, and emphasizes it to the jury and says, "You have
13 to ignore it," which I am not sure they could do in any
14 event. I would prefer under the facts of this particular
15 case, the Court not give it. I am waiving that as a formal
16 waiver at this point.

17 THE COURT: What would the Government like to
18 say?

19 MR. NESLAND: My only problem with that is that
20 they may wonder why that evidence comes in when there is
21 no charge in the indictment. I did not present it as part
22 of my opening statement that it would be used for identifi-
23 cation purposes for them, and, therefore, it seems to me
24 that they may have a problem of wondering just "What can
I do with that?" It is not like flight, where you can argue

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2 flight, which is a common-sense term for -- that anybody
3 runs from a crime if they are the ones that committed it,
4 and obviously a jury under that evidence comes in for any
5 purpose they want. But when you put in a different bank
6 robbery, they will sit back and perhaps ponder, "Well, they
7 didn't talk about this in the beginning. It isn't charged
8 in the indictment. What are we to do with this?"

9 My problem really is to show you -- I think
10 you have to instruct them that this evidence is
11 properly admissible and properly considered by them, and
12 if it's necessary, you want to state the Government's
13 contention with respect to it and the defendant's conten-
14 tion that it was all three, I have no problem with that.
15 It seems to me that they have to have some guidance as to
16 what they can do with one entire bank robbery which comes
17 in in a case like this and is not charged.

18 THE COURT: It occurs to me that a waiver by the
19 defendant does not cure the restriction that is upon the
20 judge with regard to the admissibility of the evidence.
21 The law says distinctly, "Judge, if you let that in, you
22 must make it clear that it is let in for a specific purpose,
23 and not for some other purpose." We owe that for the full
24 protection of the defendant.

I said yesterday to both of you that it would

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2 become my duty to go so far as to say to the jury that if
3 they looked upon that evidence from any other point of
4 view than the point of view that prompts its admissibility
5 into evidence, they would be befouling their own oath.
6 That's how keenly I saw it then, and even more so now,
7 and I don't think that the judge is free of that limitation,
8 and bringing that limitation to the jury by reason of a
9 waiver by a defendant. It's almost a sacred right that
10 I won't let any defendant put aside.

11 The defendant objects to this evidence, as he
12 has a perfect right to, and should stand adamant in his
13 objection, but if it's to be received, the cases say
14 "limited, limited, limited, limited purpose" -- if you
15 would be patient enough, I'd like to send for some papers
16 on the desk -- on the bench, which I wanted to add on to
17 today's record to complete the statement I made yesterday
18 as to why I was receiving, allowing this evidence in. It
19 is apropos of what we are discussing now, because the
20 language in that particular case emphasizes the limited
21 purpose of that evidence, as does, for that matter, every
22 case we have found; the emphasis is on "limited."

23 MR. NESLAND: It's admissibility is limited to
24 enabling them to use it as an aid to determine the identity
25 of the defendant --

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2 THE COURT: And that's all.

3 I am going to say to them, if a judge has to
4 feel that where evidence admitted might result in the
5 jury attaching to it a forbidden interpretation, then justice
6 can't be done. It means that evidence that we feel should
7 be admitted, can't be admitted because the jury is likely
8 to put upon it a construction that they must not put upon
9 it.

10 MR. COHN: Just so the record is absolutely clear;
11 I, of course, maintain my objection to this evidence coming
12 in at all. Given that it's coming in and that's your
13 ruling, I'm trying to make the best of it for my client
14 from his point of view, and if your Honor feels constrained
15 to give the charge despite my waiver, which I still proffer,
16 then I beg your Honor to be quite careful when you talk
17 about "It is not evidence of bad character," because,
18 again, that highlights the thing that is to be forbidden
19 in a sense, and then the jury says, "Oh, but it could be
20 used as evidence of bad character," and so I would implore
21 your Honor to say that this is merely an aid to identifica-
22 tion; that there is no concession that this is the
23 defendant by anyone; that is a question which you will
24 have to find --

25 MR. NESLAND: Based upon the evidence adduced

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2 here and the evidence adduced --

3 MR. COHN: The same way you find the two
4 charges, and I would ask you to omit any caution about
5 showing bad character, because there is no firm evidence
6 that it is my client.

7 THE COURT: I have no objection to recognizing
8 that particular point, have you?

9 MR. NESLAND: I think, your Honor, that is
10 probably commensurate with the general attitude of asking
11 defense counsel whether they do or do not want the
12 instruction on the defendant's failure to testify. Some like
13 it; some don't. Some like the jury to be absolutely told
14 not to; some feel that they are better off if there is
15 nothing said about it. I think it is the same thing here.

16 THE COURT: How do you understand the appellate
17 court has taken the waiver of that all-important instruc-
18 tion?

19 MR. NESLAND: That's up to the defendant.

20 MR. COHN: The Court of Appeals has relatively
21 recently said that the judge may give that even if not
22 requested. However --

23 MR. NESLAND: There is no question that it's
24 proper for a judge to do what defense counsel wants to do.

25 MR. COHN: By the way --

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2 MR. NESLAND: The question is when he does what
3 the defense counsel does not want him to do.

4 MR. COHN: I did not put that in my request to
5 charge, but I will request that charge, if in the end the
6 defendant does not testify, and I quite honestly think
7 he won't.

8 THE COURT: Please put it in writing.

9 MR. COHN: It's a standard charge and I assumed,
10 your Honor, --

11 THE COURT: Please, be good enough to have a
12 record, you know, a piece of paper that you submit --

13 MR. COHN: I assume you'll be charging tomorrow,
14 in any event.

15 THE COURT: Tomorrow morning.

16 I'd like to get this on the road. At any rate,
17 let's go a little further.

18 What is wrong, since I am over the repeated
19 objection, which will be considered as forcefully
20 presented, and without any limitation at all -- counsel
21 stands on it throughout the entire trial, let's make no
22 mistake about it. The Court recognizes your violent ob-
23 jections to it, so we don't have to keep repeating it
24 every single time.

25 I see no reason why, having decided to let it

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2 in, and putting on it the limited purpose that permits
3 it to go in under the law, I see no reason why, if counsel
4 doesn't want me to mention that evidence is not being
5 admitted with respect to the character of the defendant,
6 the Government has no objection to omitting it, and I will
7 omit it. But I certainly think that I would have to say
8 to them that, "You are not under any circumstances to
9 construe this evidence as even indicating that, because he
10 did one, he must have done others. That must not be in
11 your thought at all. You must not look at it that way at
12 all, otherwise you are committing a grievous error."

13 MR. NESLAND: Your Honor, I think in articulating
14 that you are going to have a problem, as I see it, because
15 one of the reasons it's in is for them to consider the
16 entire three banks to determine the identity of this
17 individual, and they may decide that the individual in all
18 three banks is the same person and they believe that the
19 individual who was arrested is the person who was in those
20 banks. But the problem is that they are using it for aid
21 in identifying the perpetrator of the two --

22 THE COURT: The purpose of allowing it in is not
23 for that reason. That doesn't prevent them from concluding
24 what you have said. Do you understand that?

MR. NESLAND: They have found that they can use

1 it for that purpose.

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3 THE COURT: Certainly. What you decide with
4 regard to it, and of what value it is in coming to a solution
5 of the problem and the full meaning of the total
6 evidence adduced, the believable evidence adduced, is up
7 to you, but I do think that I have got to say to them,
8 and I don't know what Mr. Cohn thinks about that, that I
9 should emphasize it is not being introduced to show that
10 if he did it in one he must have done it in the other.

11 MR. COHN: As I said, your Honor, given that you
12 feel you have to give something, I will take what I can get,
13 but I still maintain I'm trying to waive the whole matter.

14 Under our theory, it's a question of: Who is it?
15 The same guy did all three. I couldn't care less about
16 that part of the limiting charge.

17 THE COURT: Very well.

18 The case that I had reference to is United States
19 against Jackson, 451 Fed. 2nd, 258, 1971. Here's what
20 the trial judge said -- the case was in the Fifth Circuit.
21 Here's what the trial judge said, and that's the language
22 that was challenged on appeal:

23 "The only reason I've let in other occurrences,
24 as I previously told you, is that if there be such a
similarity of method, sometimes that may shed some light,

sometimes it doesn't; sometimes it may shed some light or indicate in some fashion that the two offenses were committed by the same person because the method of their commission was alike."

On appeal, the circuit court said, at page 262, 263:

"But by instructions, which limited its use by the jury, including that in the court's charge, to which no objection was registered, the evidence concerning the Fort Gordon incident was admitted for the specific limited purpose of demonstrating similarity of method, similarity of mode of operation, which might shed some light on the identity of the defendant as the man who committed the criminal act at Fort McPerson. The court's instructions and charge concerning the evidence not only covered mode of operation but also clearly encompassed the issue of identity."

That is the language that goes to modus operandi as well as identity. There seems to be a correlation between the two. Some language we have found on identity embraces modus operandi in order to help out the identification. So I want to be sure that the basis for my ruling yesterday, with respect to the admissibility of the evidence, takes in the broad scope of identity, which

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2 includes modus operandi by which the identity may sometimes
3 be established.

4 MR. COHN: If your Honor is going to use the
5 Jackson language, which seems to have been approved
6 by the Fifth Circuit, I would ask your Honor to append
7 thereto, the language to the effect that the mere fact
8 that your Honor is admitting this testimony does not mean
9 that it accomplishes its purpose; that that is a question
10 that purely the jury has to decide.

11 In other words, I think it is a danger under
12 that language that if you have admitted it, they say, "Oh,
13 well, it does something" --

14 THE COURT: I hope I can satisfy you. I'm
15 anxious to satisfy the law, and I know you want me to do
16 it and I know that you want me to do it, both of you, only
17 because I've overruled the objection to its receipt, and,
18 as you say, you are doing the best you can in view of
19 that ruling. You don't want -- just because you are
20 against its admissibility, that doesn't say that by comment-
21 ing and assisting the Court with regard to a furtherance
22 of the ruling that the Court has decided to engage in,
23 that by your so doing, you are in any way waiving your
24 rights in any sense at all. You are just being an officer
of the Court, helping the Court bring over to the jury what

the Court feels should be brought to the attention of the jury without adding more harm to the defendant.

(In open court.)

THE COURT: Ladies and gentlemen of the jury, we have had a discussion in the robing room with respect to certain evidence that is going to be admitted. That evidence requires a word or two of definite instruction from the judge.

It relates to an alleged robbery at a Swiss Bank -- I don't know for the moment what the full name is -- Swiss what?

MR. NESLAND: Swiss Bank Corporation.

THE COURT: -- Swiss Bank Corporation. Now, this defendant on trial before you is not charged with any crime relating to the Swiss Bank.

Then why do we allow that evidence in? It is to enable the jury to consider it in connection with the problem of identification. Was this defendant on trial before you the man at the Chase Bank? Was he the man at the Manufacturers Hanover Bank?

It must be clear to you by this time that the witnesses testified about a person coming into the bank, the Chase Bank and the Manufacturers Bank, and according to them, using the words and the gun, and all the rest of it,

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it was enough to put them in a certain amount of fear,

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and so the identity is not as clear cut, defined as it

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might be, let's say; if there was a conversation under

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ordinary circumstances lasting 10, 15 minutes in which

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a person would have had opportunity to sum up and closely

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observe the person being interviewed.

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And so the law says that the Court in its

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discretion may admit the evidence which you are about to

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hear for the limited purpose of identification. And

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the Court must insist that you understand that it's going

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in for that limited purpose and that you will obey the

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Court's direction that its admissibility was for that

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purpose and not to prove another crime.

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Do I make myself clear?

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Has anybody any doubt about it? I can't give

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you the whole law on that right now. It will become far

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more clear after you hear the evidence and after the

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judge comes to the point where he charges the jury on

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the law, but right now I just want to know whether what I

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have said in and of itself makes sense and is clear to

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you. And you're not to hesitate when the judge says,

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"Is it clear?" You are not to hesitate to raise your

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hand and say, "Judge, I don't quite get this," or "I don't

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quite get that." Don't hesitate to do that.

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2 I ask you again, what I said, is it clear to
3 you? Has anybody any question on it?

4 Very well. Proceed, Mr. Nesland.

5 MR. NESLAND: The Government calls Gemma Durand.

6 GEMMA DURAND, called as a witness by the
7 Government, being first duly sworn, testified as
8 follows:

9 THE COURT: You'll save yourself a lot of embarrass-
10 ment if you will be good enough to remember that you are
11 in a courtroom; that we are trying a case and that it behooves
12 you as an American citizen -- and I take it you are -- to
13 raise your voice so that other American citizens, sitting
14 as a jury in this case, can hear what you have to say.

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(At 9:10 p.m., a note was received from the

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jury.)

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THE COURT: Yes, it is 9:20. At 9:10 this note was received by the clerk from the marshal. It is a note from the jury and it reads as follows:

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"Law concerning assault on officer and right to self-defense regarding 5th charge.

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"What does the law say if there is a reasonable doubt that the defendant was aware of the identity of the FBI agents? If ignorant, what rights does the defendant have to defend himself?

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"Could you explain this point in layman's language?"

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That's what they seem to be troubled about.

Let me read it to you again. In fact, I will

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2 do what I would insist on if I was a lawyer. You look at
3 it yourselves.

4 (Pause.)

5 MR. NESLAND: In reading it, your Honor, it
6 would seem to me that they are really asking for an
7 expansion--and Mr. Cohn, of course, can speak to this, too--
8 they are asking for an expansion of that part of your
9 charge which I recall went to the intent, I believe, and
10 I believe it was in the part where you said they did not
11 have to know he was a federal agent but he had the right,
12 as I recall the charge, to act in good faith if he honestly
13 believed that he was acting in his own self-defense, if I
14 remember the charge.

15 It looks to me like they are focusing on that
16 part of the instruction.

17 THE COURT: I do, too; don't you, Mr. Cohn?

18 MR. COHN: I think that is true. I put a
19 slightly different emphasis on it, as one might expect --

20 THE COURT: No, I want the benefit --

21 MR. COHN: I think that they are announcing here --
22 you gave them a bipartite test. You said first if they
23 found that he didn't know, and was acting in self-defense,
24 then they had to find another thing and that was -- and
25 I'm paraphrasing the charge, obviously, that the force he

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2 used was not beyond that which he should have used given
3 the circumstances he found himself in, essentially.

4 I think what they have announced here is that
5 they feel there is a reasonable doubt that he knew that
6 they were agents, and they accept the fact that he was--he felt
7 set upon; and I think it's the second branch of your
8 test that is causing the problem, and that's what I would
9 focus on.

10 If we can hammer out some "layman's language,"
11 I don't know whether that is proper or not.

12 THE COURT: Do you believe, Mr. Cohn, that even
13 assuming for the sake of argument that the evidence shows
14 that the defendant was put on notice, but he was not at
15 all convinced; suppose that were the case.

16 MR. COHN: But I don't know that that's the
17 case, and I don't think we can inquire into their minds
18 to find out how --

19 THE COURT: Isn't that what they have in mind?

20 MR. COHN: No. Because my argument to them, as
21 you remember on summation, was that they never announced
22 themselves at all.

23 THE COURT: Precisely.

24 MR. COHN: Not that he knew, that he was mixed
25 up, but that they never pulled a gun or anything; they

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2 just disregarded him. That was my argument. I don't know
3 how they are thinking. They may well be thinking along
4 the lines you are suggesting.

5 THE COURT: You have given me the benefit of your
6 reaction -- you have given it to me, Mr. Cohn, on behalf
7 of your client, and you for the Government. I would
8 send for the jury and do the best we can.

9 MR. COHN: I would suggest that your Honor read
10 that portion of your charge, to them, engaged in reasonable
11 force in defending yourself, and that would be the only
12 thing I would agree to.

13 THE COURT: I don't know about that; but I'll
14 talk to them and see if I can't get the point home.

15 MR. COHN: Will your Honor, before dismissing
16 them this time to go back, at least take suggestions or
17 objections to this part of your charge? Last time they
18 came for an additional charge you did not, because it was
19 just a rehash of your charge, but I would appreciate that
20 opportunity at this time.

21 THE COURT: You have that opportunity without
22 question. That is your right.

23 (Jury enters the courtroom at 9:30 p.m., and
24 the following ensued):

25 THE COURT: Ladies and gentlemen of the jury,

2 we have your last note, and counsel join me in thanking
3 you for the care in which you are going about your under-
4 taking; and you have a perfect right to keep insisting on
5 understanding what the law has to say, and until it is
6 clear to you, then you keep pounding away until it is made
7 clear to you.

8 Your note reads:

9 "What does the law say if there is a reasonable
10 doubt that the defendant was aware of the identity of
11 the FBI agents? If ignorant, what rights does the defendant
12 have to defend himself?

13 "Could you explain this point in layman's
14 language?"

15 I'll do the best I can and I hope I can get
16 through to you on the point. It isn't easy, and don't
17 feel at all apologetic for asking for further elaboration.

18 I've already read you the charge, and from it
19 you must have gathered that the law insists that its lawful
20 officers go about the performance of their assigned tasks
21 without interference. The law does not want the potential
22 offender, the one under suspicion, the one who is about
23 to be apprehended, to interfere in any way with the course
24 of those authorized to carry out the law in the performance
25 of their assignment.

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2 Suppose the officers had reason to believe --
3 let's take an entirely distinct example -- that so and so,
4 "X," we will call him, has been selling drugs and he just
5 got through making a sale, and that the observation by
6 officers of his department satisfies them that he did
7 not get rid of all the drugs in his possession, made a
8 partial sale. They close in on him; they want to arrest
9 him; and he recognizes it. He's got the remnant of that
10 drug in his fist, and he's about to put it in his mouth,
11 swallow it -- there is no evidence. One of the most
12 important features of that episode, possession right
13 there and then; the most eloquent piece of evidence under
14 the circumstances, and he's about to dispose of it.

15 The FBI, "You are under arrest." Quick words.
16 As they see his movement toward his mouth, they grab him
17 and he resists and under the heat of the excitement and
18 the clear knowledge on the part of the potential offender
19 of what this will mean, the adrenalin in his system enables
20 him to offer a resistance that makes him as slippery as an
21 eel. What then? How are they to hold him? It isn't
22 three against one or seven against one. It's the quality
23 of the resistance, the force of the resistance. And if
24 you have lived, you've seen men of five-feet-seven offer
25 a battle to men six-feet tall.

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2 You are asked what happened here? You were
3 told, and it's up to you to believe, accept or reject,
4 that they announced who they were. "Freeze. FBI."

5 According to the testimony, and it is for you
6 to accept or disregard, I'm just saying there is testimony,
7 which, if you choose to believe, shows that the defendant
8 was made aware that these were officers of the law, and
9 under those circumstances he would have no right to resist.
10 And if he did, as I gave you in the charge, they would
11 have the right to use reasonable force to subdue him.
12 They would not have any right to punish him, to beat him
13 up, unnecessarily, no.

14 If you have got the impression that they exerted
15 force other than what their duty required, then throw out
16 the charge. But if they used reasonable force, they had
17 a right to.

18 You will never get a man to be on the FBI or
19 to protect you if you want him to get himself beaten to
20 a pulp while he goes about the performance of his duty,
21 provided he does it with humanity; not by way of punishment,
22 brutal behavior.

23 If a man exercises himself in such a way that
24 he doesn't capitulate but, on the contrary, causes the
25 arresting officers to exert themselves to the extreme, then

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2 the question always is: Was the amount of force necessary
3 to subdue him proper under all the facts and circumstances
4 then existing?

5 Let's take an extreme case. A man is deaf and
6 he doesn't hear the officers say, "I'm FBI," or "I'm a
7 detective on the police force of this locality and I have
8 a warrant for your arrest." The man is dressed in plain
9 clothes: there is no insignia; there is nothing that a
10 person about to be arrested can look to; and it requires
11 quick action. Oh, it's easy when there is no requirement
12 of quick action, when the offender isn't doing anything,
13 when the offender isn't offering any resistance; when the
14 offender hasn't got a gun that he's liable to use, when
15 the offender -- when the officers have no reason to fear.
16 That's a pushover; there is nothing to that.

17 You don't use force under those circumstances.
18 That is easy. But suppose he didn't hear and they actually
19 were law enforcement officials having a perfect right to
20 execute a warrant for his arrest, and he believes that
21 these are strangers -- let's take that extreme example --
22 who are they? He doesn't know. That's an extreme example.
23 Then he might very well have a perfect right to resist
24 their efforts to touch him.

25 Here, in this case, if you want to take the

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2 evidence with regard to putting the defendant on notice of
3 who they were and pushing it aside and say that, "Nobody
4 said such 'a thing. I don't believe it," says the jury.
5 "I don't believe that you said, "Freeze. FBI. I don't
6 believe all the other elements that dealt with the
7 identification, don't believe it." Well, that's the end
8 of that.

9 You say, "No. If they were FBI people carrying
10 out a lawful mandate, and he heard it, and he refused to
11 believe it, or acted in ignorance of it, he didn't care
12 to believe it, he questions it; then he would have no right
13 to resist arrest."

14 It would be very easy for a potential criminal
15 to say, "I didn't believe him, though, didn't believe him
16 at all," and to say, "that's the reason I fought him off."

17 Am I getting in a little bit more? Am I getting
18 closer to it or not? Look, I'm not asking you to compliment
19 me or to encourage me. Just tell me whether or not I'm
20 getting anywhere with it.

21 Do you understand it better now, Mr. Foreman?

22 JUROR NO. 1: Yes, sir.

23 THE COURT: How about you, madam?

24 JUROR NO. 2: Yes. Are you speaking to me?

25 THE COURT: Yes, ma'am.

JUROR NO. 2: No, I don't think so.

THE COURT: You haven't got it?

JUROR NO. 2: I think you are exemplifying on it, fine, but I don't think it's answering the questions that are being discussed explicitly. I know that it's difficult if you don't know what is being discussed, but I don't feel it's zeroing in on exactly what the issues are.

THE COURT: Fine.

What do you say?

JUROR NO. 3: I understand your point.

THE COURT: Am I making it any more clear than it was before you came out?

JUROR NO. 3: Yes, sir.

THE COURT: I'm going in the right direction? I'm not asking you whether I accomplished it, but am I going in the right direction?

JUROR NO. 3: You have made it much clearer.

THE COURT: Is that what you feel was wanted?

JUROR NO. 4: You are going in the right direction

THE COURT: How about you, sir?

JUROR NO. 5: I believe you are going in the right direction but I believe -- I'm not speaking for myself--I don't know whether you are speaking --

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2 THE COURT: I beg your pardon, sir.

3 JUROR NO. 5: I don't know whether you are
4 speaking to everyone, but as far as I'm concerned, yes.

5 THE COURT: You, Mrs. Powlow?

6 JUROR NO. 6: Yes.

7 THE COURT: Am I getting through to you?

8 JUROR NO. 6: Right.

9 THE COURT: What do you say?

10 JUROR NO. 7: Yes.

11 THE COURT: Am I on the right track?

12 JUROR NO. 8: Yes. It's moving in the right
13 direction, but it hasn't covered all the ground.

14 THE COURT: What in particular, Mr. Davis?

15 JUROR NO. 8: When you explained the law, you
16 explained one section which said that ignorance was no
17 excuse, basically, as I understood it. There were then
18 two qualifying sections. The last one as to self-defense
19 I understood, but there was one that came immediately
20 after the first part that I didn't understand.

21 THE COURT: Very well. We'll get to that.

22 You, madam?

23 JUROR NO. 9: Fine, fine.

24 THE COURT: What does that mean?

25 JUROR NO. 9: Yes, I understand.

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2 THE COURT: You, sir?

3 JUROR NO. 10: Yes, I think you are proceeding in
4 the right direction. If you can complete your analogy
5 of this deaf person who is unaware, I think it would be
6 a big help, if you pursue that to your completion.

7 THE COURT: You are nodding your head, madam.

8 JUROR NO. 11: I agree.

9 THE COURT: How about you, the 12 juror?

10 JUROR NO. 12: Yes, I understand.

11 THE COURT: All right. That makes me feel
12 that I am on the right track and I'll try to pursue it
13 further.

14 You can see that the Congressional protection
15 of officers of the law who are carrying out their duty
16 would fail completely if it was given to a person to say,
17 "Yes, I knew -- I heard them say FBI," or "I heard so
18 and so say he had a mandate from -- was a detective on
19 the New York City police force, but I didn't believe him,
20 and so I resisted arrest."

21 I say that would be contrary to what the
22 Congressional Act provides by way of protection. That
23 would mean that just because the one being arrested chose
24 to say, or believes that they are not FBI people, or
25 people in authority, he would have to have a right to

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2 resist arrest; the answer is no, he would not.

3 There is nothing that the law demands under
4 the circumstances of this case where a quick apprehension
5 is in order as distinguished from the case where one can
6 take it at great ease. Where there is peril--there was a
7 gun here, according to the evidence, which I still say
8 you have a right to disregard totally -- I'm just saying
9 what evidence there is and that if you chose to accept
10 it then that evidence would mean one thing,
11 and that is, the defendant was on notice that these
12 people were from the FBI and he would have no alternative
13 but to submit to the arrest, and he would have no right
14 whatever to use any force by way of resistance to the
15 arrest.

16 Assuming the deaf case, that the arresting
17 officer said, "We are from the FBI and we're here to
18 arrest you; now come along quietly." He didn't hear that.
19 He thinks they are strangers and they are holding him up.
20 He would have the right to use reasonable force if under
21 all of the facts and circumstances then existing a jury
22 believed that he actually entertained that notion that
23 these weren't FBI. If you believe that, then throw out
24 the case, if there were such a case.

25 Here you have evidence from which you could

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gather, if you chose to accept it, that there was a gun; that it was in the bag, the brief case carried by this defendant; that the officers were apprehensive as to its possible use, not only against them but as against the public; that the wildness of the human being, for all they know might be extreme, might not be extreme. You don't conduct an inquiry on that score when seconds count. You have to act quickly. You heard one of the officers testify as to an almost miraculous struggle wherein the officer had his hand on the gun in the brief case and the enormous force, according to that testimony, exerted by this defendant to prevent the officer from taking the gun.

If you reject all of that, then you have to decide whether or not, under all those circumstances, whatever remains of acceptable or believable or credible testimony satisfies you that the defendant was in effect unaware as to who these people were, and under those circumstances was entitled to put up reasonable resistance.

Possibly if I read the pertinent portions of the charge and the language that the law lays down, my meager attempt just now to enlighten you might take on greater significance.

This is the law, members of the jury:

The first element you must find beyond a reasonable

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2 doubt is that the persons allegedly assaulted were federal
3 employees; that is, agents of the Federal Bureau of
4 Investigation; and, further, that at the time of the
5 assault they were engaged in the performance of their
6 official duties.

7 In order to find that they were so engaged,
8 you must find that they were acting within the scope of
9 their employment as agents of the Federal Bureau of
10 Investigation, at the time they were assaulted and inter-
11 fered with, and were not on some personal venture or
12 frolic of their own.

13 Although you must find as the first element
14 that the persons allegedly assaulted were federal employees
15 engaged in the performance of their official duties, the
16 Government is not required to prove that the defendant
17 knew that the persons were federal employees. Look how
18 far the law goes. To state it another way, it is no
19 defense that the defendant did not know that the persons
20 were federal agents.

21 Congress has provided in the law, which I read
22 to you, that whoever interferes with a federal employee in
23 the performance of his duty is guilty of an offense,
24 whether he does it with knowledge that the person with
25 whom he interferes is a federal employee or not, and

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2 whatever may be his intent in so doing.

3 All that the statute in question requires is an
4 intent to assault; not an intent to assault a federal
5 officer.

6 Of course, if a defendant, acting in good faith,
7 out of an ignorance of the officer's identity, believes
8 that he is acting in lawful defense of his person or
9 property, and uses no more than reasonable force in
10 effectuating that purpose, he might be justified in exert-
11 ing an element of resistance, and such an honest mistake
12 of fact would be inconsistent with criminal intent.

13 In other words, if you believe that, you throw
14 out the charge.

15 Let me read it to you again:

16 All that the statute in question requires is an
17 intent to assault; an intention to commit assault, not
18 an intent to assault a federal officer.

19 Of course, if a defendant, acting in good faith
20 -- and you have to decide whether under all the facts
21 and circumstances this defendant acted in good faith;
22 that's your responsibility, not mine -- of course, if a
23 defendant, acting in good faith, out of an ignorance of
24 the officer's identity, believes that he is acting in
25 lawful defense of his person or property, and uses no more

1 than reasonable force in effectuating that purpose, he might
2 be justified in exerting an element of resistance, and
3 such an honest mistake of fact would be inconsistent with
4 any criminal intent on his part.
5

6 So that if under all the circumstances you say
7 under all the evidence dealing with what took place on
8 that particular occasion, you believe that this defendant,
9 you see, acted in ignorance of the officer's identity,
10 and actually he believed -- this defendant believed he
11 was acting in lawful defense of his person or property,
12 and he used no more than reasonable force in effectuating
13 that purpose, he might be justified in exerting an element
14 of resistance, and such an honest mistake of fact would
15 be inconsistent with a criminal intent on his part.

16 Here it is, so that you have to interpret that
17 evidence. I don't know which part you wish to reject or
18 which part you want to accept. But if you find that the
19 evidence warrants you in saying that under all those
20 circumstances this defendant acted in good faith out of
21 an ignorance of the officer's identity, and he believed
22 that he acted in lawful defense of his person or property,
23 and he actually used no more than reasonable force to
24 effectuate that purpose, the law says he might be justified
25 in exerting an element of resistance, and such an honest

1 mistake of fact would be inconsistent with criminal
2 intent on his part to commit an offense.

3 I think that out of due respect to you, and
4 with a full appreciation of my own limitations, there is
5 nothing wrong in my saying plainly to you that if what I
6 have said up to this moment doesn't bring the point home,
7 you have a perfect right to say, "Judge, I still don't
8 get it." The only way I know of dealing with it then,
9 because I am most anxious to get it over to you, is to
10 ask you to be good enough to raise your hand and tell me
11 what remains by way of a perplexing problem on this issue.
12 If you wish me to read the law all over again, I'd be
13 delighted to. If you think that reading it in its
14 entire context would help you further, I'm ready to do it.

15 Let me have the names of the jurors, please.

16 Mr. Hurt, the foreman, is there something that
17 you wish to say to me that might help me satisfy any
18 doubt that you have as to this particular problem?

19 JUROR NO. 1: I understand everything, your
20 Honor.

21 THE COURT: Mrs. Mitchell?

22 JUROR NO. 2: No, I think it's very clear.

23 THE COURT: Mr. Karp.

24 JUROR NO. 3: Clear to me.

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1 THE COURT: Mr. Powlow.

2 JUROR NO. 4: It's clear, your Honor.

3 THE COURT: Mr. Walker.

4 JUROR NO. 5: Quite satisfied.

5 THE COURT: Mrs. Parham.

6 JUROR NO. 6: Clear.

7 THE COURT: Mrs. Marsh.

8 JUROR NO. 7: Clear.

9 THE COURT: Mr. Davis.

10 JUROR NO. 8: Yes, it's clear.

11 THE COURT: Miss Miller.

12 JUROR NO. 9: Yes, it is clear.

13 THE COURT: Mr. Lawrence.

14 JUROR. NO. 10: Yes, it's clear.

15 THE COURT: And Mrs. Levi.

16 JUROR NO. 11: Yes, it's clear.

17 THE COURT: And Mrs. Lauer.

18 JUROR NO. 12: It's clear.

19 THE COURT: Won't you please continue with your
20 deliberations.
21

22 (At 10 p.m., the jury again retired to continue
23 their deliberations.)

24 THE COURT: Mr. Cohn.

25 MR. COHN: I object to each and every word of

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that charge.

THE COURT: Very well.

Mr. Nesland.

MR. COHN: Excuse me one second.

I further say, your Honor, that I believe your charge has so muddled the rest of the trial and so rebutted the presumption of innocence that I ask for a mistrial on the trial itself on all counts.

THE COURT: What does the Government say?

MR. NESLAND: Your Honor, the Government has no objection, your Honor. You made it clear to the jury --

THE COURT: No objection to what he said or what I said?

MR. NESLAND: No objection to the charge.

I think the jury made it eminently clear that it satisfied them and that they understood what your Honor was trying to bring home to them.

THE COURT: Very well.

Counsel, for the sake of the record, motion is denied.

Is there anything else, Mr. Cohn?

MR. COHN: No, your Honor, except that -- let me make it clear that I also find the procedure followed, in polling the jury twice, to be quite beyond my limited

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experience.

THE COURT: It is indeed limited.

Announce a recess.

THE CLERK: The Court will take a short recess

--

THE COURT: One other thing, -- I want the record to show it -- when you address the Court hereafter, -- you are aware that the tone of your voice is not recorded -- I want the record to show that it is an impertinent, sarcastic and belittling voice, and I don't resent it, but I want you to cure it.

(Recess.)

(At 10:08 p.m., the jury returned to the courtroom.)

THE COURT: Please proceed, Mr. Clerk.

THE CLERK: Members of the jury will answer present as their names are called.

(Jury roll called - all present.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: How do you find the defendant on Count 1?

THE FOREMAN: Guilty.

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2 THE CLERK: How do you find on Count 2?

3 THE FOREMAN: Guilty.

4 THE CLERK: On Count 3?

5 THE FOREMAN: Guilty.

6 THE CLERK: Count 4?

7 THE FOREMAN: Guilty.

8 THE CLERK: Count 5?

9 THE FOREMAN: Guilty.

19 THE COURT: No, no. That's not in evidence and
20 we cannot even suggest what it contains.
21 MR. COHN: I'll be glad to introduce it.
22 THE COURT: Sir, please. Mr. Cohn, I don't
23 want that any more. When I begin to make a ruling, you
24 say something and it is usually a ruling that is adverse
25 to you, so you butt in. If it's a ruling that is in your

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1 favor, you never butt in. Now, just wait a minute.

2 Did you read that paper, Mr. Witness?

3 THE WITNESS: Yes, sir.

4 THE COURT: Does it refresh your recollection?

5 THE WITNESS: Yes, sir.

6 THE COURT: To what extent does it refresh your
7 recollection?

8 THE WITNESS: That I did say it was similar.

9 THE COURT: You remember now that you did say
10 it.

11 THE WITNESS: I really can't say that.

12 THE COURT: For heaven's sake, why don't you
13 listen carefully to what --

14 THE WITNESS: I did, sir.

15 THE COURT: Wait a minute.

16 MR. COHN: Your Honor, I object.

17 THE COURT: What are you objecting to?

18 MR. COHN: I object to your comments to me,
19 your Honor, in all due respect, and I object to you taking
20 over this witness.

21 THE COURT: Sir, sit down. That's the order of
22 the Court. I don't intend to have anything happen here
23 that is not a fair trial to both sides.

24 Listen to me and listen carefully, and I warned
25

1
2 you about it. As a matter of fact, what you've done is
3 just revealed what is in paper that should not have been
4 revealed. That is not in evidence.

5 You are an intelligent man. Why don't you just
6 listen.

7 When a witness isn't too positive of what he
8 said, the lawyer is allowed to show him something that
9 may help him refresh his recollection, trigger his memory.
10 He can show him anything. He can show him a monument,
11 a hunk of stone. He can show him a book, a piece of paper,
12 a notation, a hunk of wood, a glass of water, and he can
13 say, "Look at this. Read it to yourself. Does it trigger
14 your memory? Does it refresh your recollection? Does it
15 make you recall?" And so the witness looks at what he's
16 shown and then he answers, "Yes, it does refresh my
17 recollection. Now, I remember. Now it comes back to me."

18 Do you understand that?

19 THE WITNESS: Yes, sir.

20 THE COURT: That's all that was happening here.

21 THE WITNESS: I don't recall.

22 THE COURT: Very well. Now, give me that
23 exhibit again, sir.

24 Hand it to the clerk, Mr. Cohn.

25 Take this paper, Mr. Witness -- it's marked G

bslm

Pittinsky-cross

for identification -- read it again and read it to yourself
and don't say, "What is in it?"

(Pause.)

THE WITNESS: I read it, sir.

THE COURT: Did you read every bit of it?

THE WITNESS: Yes.

THE COURT: The simple question is: Having read
it, does it refresh your recollection as to whether you
said to the person who showed you the photographs--Mr.
Mawn--does it refresh your recollection that you said
something or you used the word "similar"? Does it come
back to your mind that you did use the word "similar"?
All right, then say so.

THE WITNESS: I did so.

THE COURT: You did not, not until he had to
belabor all of this.

Take the paper from him, Mr. Clerk, and give it
to Mr. Cohn.

Is there anything else of this witness?

MR. COHN: I have nothing else, your Honor.

I respectfully move for a mistrial.

THE COURT: Motion denied.

Anything further by the Government?

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REDIRECT EXAMINATION

BY MR. NESLAND:

Q You were asked on cross-examination that at a certain period of time you did not know that a bank robbery was being perpetrated. When for the first time did you realize in your mind that a bank robbery was occurring?

A When the gentleman asked me for the twenties.

Q When you say the "gentleman," do you mean Mr. Dishington or the defendant?

A The defendant.

MR. NESLAND: No further questions.

THE COURT: Now that you have sat there for something like 17 minutes, do you wish to alter your testimony in any respect?

THE WITNESS: No, sir.

THE COURT: Take another look at the defendant.

Is that or is that not the man to whom you gave the money?

THE WITNESS: That's the man.

THE COURT: Have you any doubt about it?

THE WITNESS: No, sir.

THE COURT: Step down, sir.

MR. COHN: Objection to the last line of questioning, your Honor.

1
2 THE COURT: Objection overruled.

3 (Witness excused.)

4 THE COURT: I will see counsel in chambers.

5 MR. NESLAND: I have one further witness with
6 respect to these banks.

7 THE COURT: I'm sorry. I have a conference with
8 a brother-judge, and it's overdue.

9 We will adjourn the case for trial tomorrow
10 promptly at ten o'clock, and we resume at that time.

11 As soon as the jury leaves the courtroom, I want
12 both counsel in the robing room, with the court reporter.

13 (Jury excused.)

14 (In the robing room.)

15 MR. COHN: Your Honor, on the record, as I think
16 this should be --

17 THE COURT: We will go on the record when I say
18 we go on the record. Out in the courtroom.

19 (In open court.)

20 THE COURT: Go ahead, Mr. Cohn.

21 MR. COHN: Your Honor, during one part of the
22 proceedings, I took a picture from Mr. Nesland, which I
23 believe is E in evidence, and because of some confusion
24 between Mr. Nesland and I, there was some confusion about
25 the way it was going in.

1 bslm

2 Your Honor, at that point, made some comments
3 that indicated that I was trying to slip one by the
4 prosecutor by putting something into evidence that he had
5 never seen. I think those are the words you used, "some-
6 thing that he had never seen."

7 In fact, quite the opposite is true; that, in
8 fact, I had gotten that from the prosecutor. We had been
9 over it in his office. And that I believe your Honor saying
10 that in front of the jury had no effect, but to cast the
11 defense in a bad light. I refrained during the trial from
12 doing it until after the jury was gone, but I wish the
13 record to reflect that I regard that as an egregious
14 error and I move for a mistrial.

15 MR. NESLAND: I'd like to speak to that.

16 THE COURT: Certainly.

17 MR. NESLAND: When that happened, your Honor, I
18 asked -- I stated that I assumed that it was the picture
19 that I handed him, but I couldn't make that representation
20 until I had seen it, and your Honor said that I should look
21 at it. I did, and I stipulated to it. I don't think there
22 was any impression created any one way or the other except
23 that the prosecutor better be on his toes and look at the
24 photographs and anything shown to the witness before it
25 was done.

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1 bslm

2 THE COURT: You have stated it precisely, Mr.
3 Nesland, that the prosecutor should not be in a position
4 where he is saying, "I so stipulate," without even knowing
5 what he's stipulating about, and that's what the record
6 brought to my attention.

7 I will stand on the record and I deny the motion.

8 What else is there?

9 MR. COHN: That was it, your Honor.

10 THE COURT: Is that it?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-against-

LEROI HAYES,

Defendant.

76 Cr. 362
(IBC)

MEMORANDUM

S.D. OF N.Y.

Aug 20 12 01 PM '76

FILED
U.S. DISTRICT COURT

-----X
IRVING BEN COOPER, D. J.

Defendant Hayes moves for an order permitting him to appeal in forma pauperis, and for a copy of the stenographic transcript (estimated at \$1,117.00) at Government expense. We deny the motion without prejudice to renew at a later date.

Defendant was charged in indictment 76 Cr. 362 with four counts of armed bank robbery and one count of assaulting a federal officer, in violation of Title 18, U.S.C. §§ 2113(a), 2113(d) and 18 U.S.C. 111 and 1114. We presided at the trial to a jury in this case which lasted from June 15-17, 1976. On June 17, 1976, Hayes was convicted on all counts. On July 14, 1976, we imposed a total sentence of thirty-three years confinement.

BEST COPY AVAILABLE

Defendant's moving papers are insufficient to meet the statutory requirements of 28 U.S.C. § 1915(a) to proceed in forma pauperis and to obtain at Government expense the stenographic minutes of the trial. See United States v. Scharf, 354 F.Supp. 450 (E.D. Pa. 1973); United States v. Coor, 213 F.Supp. 955 (D.D.C. 1963). We turn to the specific deficiencies in defendant's moving papers.

Hayes has attached to his proposed order two affidavits: first, a financial affidavit, CJA form #23, signed by the defendant himself and second, an affidavit of Frederick Cohn, Esq., defendant's trial counsel.

In his financial affidavit, defendant fails to delineate his assets adequately. Although he lists his 1973 income as \$15,000, and represents that it was derived from self-employment, Hayes does not explain what constituted his "self-employment". We are certainly left wondering where defendant acquired his assets. Testimony at trial revealed that defendant was a businessman, yet Hayes does not list any of the businesses from which he derived his 1975 income. There was also testimony adduced by defendant (he did not testify) which suggested that he had access to large amounts of cash; it was disclosed that he paid his lawyers (called to the stand by him) large amounts in cash in the not too

distant past in a legal matter unrelated to the case before us. There is no indication from defendant's financial affidavit where he acquired such cash. Bare assertions of income such as we have here fall short of establishing the requisite detail of a valid in forma pauperis petition. See Jefferson v. United States, 277 F.2d 723 (9th Cir. 1960) cert. den. 364 U.S. 896 (1960).

A glaring discrepancy surrounds defendant's accounting of his assets. On two separate occasions within the space of a month the defendant claimed his total assets on one occasion as \$28,000, on another occasion as \$15,000. This obvious conflict may be gleaned from the following: In a "Financial Statement" signed by defendant on June 24, 1976 and submitted to the Probation Office, Hayes claimed his assets amounted to \$28,000 :

" U.S. DISTRICT COURT - Probation and Parole Office

FINANCIAL STATEMENT OF

Roy Hayes

1. Cash

On Hand:

In Commercial
Acct.

None Bank

Amount

In Whose
Name

In Savings
Acct.

None Bank

Amount

In Safe
Deposit Box

None Bank

Amount

Any Other
Cash

None

"2. Securities

Stocks:

____ Shares None _____

____ Shares None _____

Mortgages
Receivable None _____

Notes
Receivable \$23,000 _____

Loans
Receivable \$ 5,000 _____

Real Estate None _____

Description _____

Location _____

Amount

In Whose
Name

3. Other Assets

Auto None _____

Jewelry None _____

Household Goods _____

Insurance 3 Policies _____

(Cash Value) _____

Miscellaneous _____

Do Not
Know
Value

4. TOTAL ASSETS

\$

28,000

LIABILITIES

5. Current Obligations (Legal)/12,000 _____

6. Notes, Loans & Mortgages Payable \$6,000 _____

7. Suits, Judgments, Garnishees \$7,000 _____

"8. Other Debts _____
 9. Total Liabilities ----- \$ 25,000
NET WORTH \$ 3,000

I swear that the above schedule has been prepared by me and, to the best of my knowledge and belief, is a true, correct and complete account of my net worth, made in good faith as of _____

/s/ Roy Hayes 6/24/76

In his present affidavit completed merely a month after the foregoing Financial Statement (no date is given but the proposed order was served on the Government on July 26, 1976) Hayes states that he has assets of only \$15,000 and liabilities of more than \$25,000 for a net deficit of more than \$10,000:

FINANCIAL AFFIDAVIT

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

Employment	Are you now employed <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Am Self Employed	
	Name and Address of Employer: _____	
	IF YES, how much do you earn per month? _____	IF NO, give month and year of last employment _____
		How much did you earn per month? \$ _____

ASSETS

Other Income	<p>Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments or other sources</p> <p style="text-align: right;"><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>IF YES, Give the Amount Received and Identify the Sources</p> <table border="0" style="width: 100%;"> <tr> <td style="text-align: center;"><u>Received</u></td> <td style="text-align: center;"><u>Sources</u></td> </tr> <tr> <td style="text-align: center;">\$15,000</td> <td style="text-align: center;">Self-employment</td> </tr> </table>			<u>Received</u>	<u>Sources</u>	\$15,000	Self-employment
<u>Received</u>	<u>Sources</u>						
\$15,000	Self-employment						
Cash	<p>Have you any cash on hand or money in savings or checking account <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>IF YES state total amount \$ _____</p>						
Property	<p>Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?</p> <p style="text-align: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>IF YES, Give Value and Describe It</p> <table border="0" style="width: 100%;"> <tr> <td style="text-align: center;"><u>Value</u></td> <td style="text-align: center;"><u>Description</u></td> </tr> <tr> <td style="text-align: center;">\$ _____</td> <td></td> </tr> </table>			<u>Value</u>	<u>Description</u>	\$ _____	
<u>Value</u>	<u>Description</u>						
\$ _____							
Dependents	<p>Marital Status</p> <p><u> </u> Single</p> <p><u> x </u> Married</p> <p><u> </u> Widowed,</p> <p><u> </u> Separated</p> <p><u> </u> or Divorced</p>	<p>Total No. of Dependents</p> <p style="text-align: center;"><u> 3 </u></p>	<p>List persons you actually support and your relationship to them</p> <p><u>Ashia Hayes</u> (dtr.)</p> <p><u>Darlia Hayes</u> (dtr.)</p> <p><u>Damian Hayes</u> (son)</p>				

OBLIGATIONS AND DEBTS

**OBLIGATIONS
AND DEBTS**

Debts & Monthly Bills (List all credi- tors, including Banks, Loan Com- panies, Charge Accounts, etc.)	Apartment or Home:	Total Debt	Monthly Payt.
		\$	
	Bank Loans	\$8,000	
	American Express	\$2,500	\$
	Avis Rent- als	\$1,600	\$
	Other Charge Accounts	\$	
	\$3,500	\$7,600	
	Personal Loans	\$10,000	\$10,000

I certify the above to be correct

Signature of DEFENDANT

/s/ Roy Hayes

**WARNING: A FALSE OR DISHONEST ANSWER TO A
QUESTION IN THIS AFFIDAVIT MAY BE
PUNISHABLE BY FINE OR IMPRISONMENT
OR BOTH."**

Defendant Hayes has not attempted to explain the dis-
parity between these forms and his attorney in his affidavit
(verified July 22, 1976) offers the excuse that it was "a
misunderstanding on his [Hayes'] part." We are unimpressed.

As far as his debts are concerned, defendant lists, among others, "Bank loans -- \$8,000; Personal loans -- \$10,000." The Court should be informed as to the creditors on each of these loans, the date that the loans were taken out, and the dates the loans are due. See Jefferson v. United States, supra. Moreover, the clear language of the financial form that defendant filled out requests affiant to "list all creditors." Defendant has proved deficient in this regard also.

The lack of specificity in defendant's affidavit forms only part of our reluctance to grant defendant's motion. In conjunction with our examination of defendant's financial affidavit, we are constrained to record our general impressions of him from our observations in open court. As a judge for decades, we feel somewhat qualified to make this assessment. We must in all candor say that defendant's credibility, as it bears on his present affidavit, is suspect.

The testimony at trial, which testimony we are now bound to accept, revealed defendant as ruthless, cold, calculating, cunning and conniving. At all times our impression at trial was unaltered that this defendant was a "cool operator." He has very little credibility with this court, and in the absence of a supplemental affidavit delineating in greater detail his income and obligations, we are unable

to accept his claim of indigency. See United States v. Scharf, supra.; Jefferson v. United States, supra.

Frederick Cohn, Esq., defendant's trial counsel has also submitted an affidavit supporting defendant's indigency claims. We question whether this attorney has any first hand knowledge of defendant's finances. We also suspect the reliability of a defense lawyer who remained totally silent and failed to correct the Court when we mistakenly stated, on the record in open Court and (after the verdict) in the presence of the jury (June 17, 1976), that defense counsel was assigned in this case, whereas in fact he was privately retained.¹

There is one final shortcoming in defendant's moving papers. Title 28 U.S.C. §1915(a) requires that affidavits in support of in forma pauperis petitions "state...affiant's belief that he is entitled to redress." Neither defendant nor

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1. In his affidavit (verified July 22, 1976) Attorney Cohn states: "I was privately retained for the trial of this matter in the United States District Court. The defendant has been unable to pay me the balance of my fee, which is substantial."

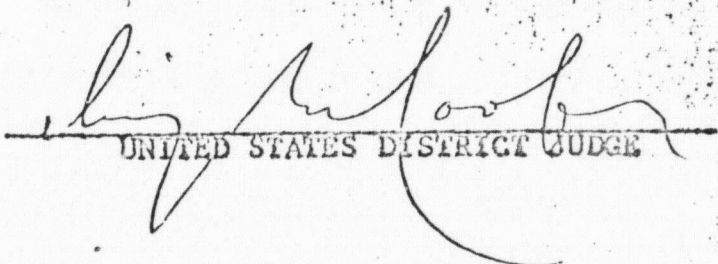
his counsel has made such a representation. See Moon v. United States, 422 F.2d 692 (D.C. Cir. 1969); United States v. Crossman, 299 F.Supp. 779 (D. Okla. 1969); Martin v. Henderson, 289 F.Supp. 411 (D. Tenn. 1968).

During our judicial tenure we have witnessed to our dismay, and fought against it, the gross and shocking unfairness (tantamount to justice denied) visited upon defendants without benefit of legal representation and other considerations now at long last mandated by law. These precious rights must not be abused by either side to the controversy. An indifferent, inadequate, careless or demeaning approach to their assertion is unthinkable. While we acclaim these precious rights, in the appropriate situation we invariably grant all the relief the law allows, mindful all the while that non-indigent defendants, who make up by far the larger part of the criminal case calendar, barely manage to retain private counsel and only on very infrequent occasions can afford the expense attached to securing those other rights "for free" now made available to those clearly unable to pay therefor.

For the foregoing reasons, principally relating to the lack of specificity as to defendant's financial status, we are constrained to, and do, deny defendant's motion at this time, with permission to renew if, as and when the infirmities are cured.

SO ORDERED:

New York, N.Y.
August 18, 1976


UNITED STATES DISTRICT JUDGE

COPY RECEIVED
DEC 15 1976
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.